

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LARRIANTE SUMBRY,)	
)	
Petitioner,)	
)	
v.)	C.A. No. 05-10414-JLT
)	
CECIL DAVIS,)	(1st Cir. No. 05-1617)
)	
Respondent.)	

ORDER ON PETITIONER'S MOTION FOR
LEAVE TO APPEAL IN FORMA PAUPERIS

TAURO, District Judge

For the reasons stated below, the Court denies the petitioner's motion for leave to appeal in forma pauperis.

BACKGROUND

On April 12, 2005, the Court ordered the dismissal of the Larriente Sumbry's request under 28 U.S.C. § 2254 for habeas relief. In its order of dismissal, the Court explained that it lacked jurisdiction over Sumbry's petition because Sumbry was not "in custody" within the District of Massachusetts. The Court declined to transfer the case to the district in which Sumbry was confined--the Northern District of Indiana--because Sumbry had apparently filed his petition in the District of Massachusetts (and in many other federal district courts outside of Indiana¹)

¹The Court notes that between April 12, 2005 and the present date, Sumbry filed habeas petitions in the District of Wyoming, Sumbry v. Davis, C.A. No. 05-10025-CAB (filed Apr. 25, 2005); the District of Columbia, Sumbry v. Davis, C.A. No. 05-00905-UNA (filed May 6, 2005); the Northern District of Iowa, Sumbry v. Davis, C.A. No. 05-00088-LRR (filed May 18, 2005); the Eastern District of New York, Sumbry v. Davis, C.A. No. 05-03253-NG

in an attempt to circumvent the filing restrictions placed upon him by the Seventh Circuit Court of Appeals in Montgomery v. Davis, 362 F.3d 956 (7th Cir. 2004) (per curiam). In the same order, the Court certified that an appeal of the order would not be taken in good faith within the meaning of 28 U.S.C.

§ 1915(a)(3).²

Sumbry now seeks in forma pauperis status to appeal the dismissal of his case. On July 13, 2005, the First Circuit Court of Appeals transmitted to this Court Sumbry's motion for leave to appeal in forma pauperis.

DISCUSSION

The Court denies Sumbry's motion for leave to appeal in forma pauperis on the ground that any appeal of the Court's April 12, 2005 order of dismissal would not be taken in good faith within the meaning of 28 U.S.C. § 1915(a)(3) ("An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."). The Court already explained the basis for this holding in its April 12, 2005 order:

Assuming, arguendo, that Sumbry's motive in appealing this order was not improper, his appeal would

(filed June 10, 2005); and the Eastern District of Virginia, see Sumbry v. Davis, C.A. No. 05-00125-GBL (filed June 27, 2005).

²The Clerk sent a copy of the Court's April 12, 2005 order to Judge Allen Sharp of the Northern District of Indiana, who, in turn, directed that a copy of this Court's order be forwarded to the Seventh Circuit Court of Appeals. See Sumbry v. Davis, Cause No. 3:05-CV-113-AS (D. Ind. Apr. 19, 2005) (Sharp, J.).

nonetheless not be taken in good faith: "The applicant's good faith is established by the presentation of any issue that is not plainly frivolous." Ellis v. United States, 356 U.S. 674, 674 (1958) (per curiam); see also Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000); Wooten v. District of Columbia, 129 F.3d 206, 208 (D.C. Cir. 1997). In legal parlance, a complaint is "frivolous" if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Any argument on appeal that the Court improperly dismissed Sumbry's case would "lack[] an arguable basis in law or in fact." The Court's lack of jurisdiction over this case is unquestionable, and transferring this case to the Northern District of Indiana would work against the sanctions imposed by the Seventh Circuit. Thus, if Sumbry chooses to appeal this order, he will not be able to do so proceeding in forma pauperis.

Apr. 12, 2005 Order at 7.

CONCLUSION

Accordingly, the Court denies Sumbry's motion for leave to appeal in forma pauperis.

SO ORDERED.

8/1/05
Dated

/s/ Joseph L. Tauro
UNITED STATES DISTRICT JUDGE